(10)

No. 91-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioner,

—v.—

FRANK ROBERT WEST, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF GERALD GUNTHER, PHILIP B. KURLAND, DANIEL J. MELTZER, PAUL J. MISHKIN, MARTIN H. REDISH, FRANK J. REMINGTON, DAVID L. SHAPIRO, AND HERBERT WECHSLER, SUPPORTING AFFIRMANCE

LARRY W. YACKLE*
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

* Counsel of Record for Amici Curiae

No. 91-542

In the

Supreme Court of the United States

October Term 1991

Ellis B. Wright, Jr., Warden, et al.,

Petitioner,

vs.

Frank Robert West, Jr.,

Respondent.

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF GERALD GUNTHER, ET AL.

Gerald Gunther, Philip B. Kurland, Daniel J. Meltzer, Paul J. Mishkin, Martin H. Redish, Frank J. Remington, David L. Shapiro, and Herbert Wechsler move the Court, pursuant to Rule 37.4, for leave to file the attached brief as amici curiae in support of affirmance.

1. The respondent, Frank Robert West, has consented to this filing by letter lodged with the clerk. The petitioner, Ellis B. Wright, Jr., has declined to consent.

2. Amici are professors of law specializing in the jurisdiction of the federal courts and the administration of justice in the United States.

3. On December 18, 1991, the Court amended its previous order granting the warden's petition for certiorari in order to request briefs on a question, articulated by the Court itself: whether a federal habeas court should independently apply legal principles to the facts of specific cases.

4. This general question of federal law has important implications for the federal system well apart from the parties' interests in this particular

case. First, the question bears on the maintenance of the habeas jurisdiction as a mechanism for testing the legality of custody under federal law. Second, it carries significant implications for Congress' role in the prescription of federal court jurisdiction pursuant to Article III of the United States Constitution.

5. The attached brief amici curiae is addressed only to this second set of implications, which sounds in the separation of powers.

6. We understand from Mr. Wright that he has consented to amicus briefs by the American Civil Liberties Union and the American Bar Association and that he believes that those briefs will advance the argument that our brief makes.

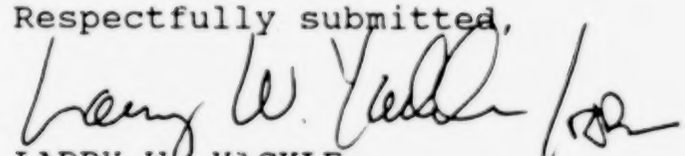
7. We respectfully submit that our brief will bring a different, academic

perspective to the extremely important, general question of federal law before the Court.

8. Over many years, we have debated one another regarding a wide variety of issues touching the federal judicial system, frequently taking sharply different positions. With respect to the question on which the Court has invited briefs in this case, however, we are in solid agreement. In the exercise of its constitutional authority, Congress has directed that the federal habeas courts should independently apply the law to the facts of particular cases. We believe the Court will find our argument helpful in addressing its own question, and we do not believe that briefs by the other amici mentioned will make the same argument in the same way.

DATED this 4th day of March , 1992.

Respectfully submitted,



LARRY W. YACKLE
Counsel for Amici Curiae
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

ISSUE PRESENTED

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES PAGE

LEGISLATIVE BILLS PAGE

HEARINGS PAGE

REPORTS PAGE

ARTICLES PAGE

STATEMENT OF THE CASE

In this habeas corpus case from Virginia, the Court of Appeals for the Fourth Circuit awarded relief on the ground that the prosecution's evidence was insufficient to support conviction under the test established in Jackson v. Virginia, 443 U.S. 307 (1979). In addition to the issues the warden set forth in his petition, this Court asked the parties to brief an additional question: whether a federal habeas corpus court should "give deference" to a previous state court "application of law to the specific facts" of a petitioner's case or "review the state court's determination de novo." This brief focuses exclusively on the Court's own question.

STATEMENT OF INTEREST

A statement of interest is set out in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

The question on which this Court has requested briefs is a question of statutory construction. Article III of the United States Constitution assigns the prescription of the inferior federal courts' jurisdiction to political judgments made by Congress. This Court has authoritatively construed the habeas corpus statutes to require de novo adjudication of cognizable claims in federal court. This interpretation has stood for decades, has been the basis for interim legislation, and should not be abandoned without congressional action.

The federal courts' jurisdiction to entertain habeas corpus petitions from state prisoners was established in 1867. Under the framework of that Act, habeas constitutes a specially defined mechanism for testing the legality of detention.

The federal courts do not directly review state criminal judgments, but rather entertain independent petitions from prisoners who challenge the legality of their custody. To perform its function, a federal court cannot defer to a previous judgment in state court, but is obligated to address afresh the prisoner's claim against current custody.

In Brown v. Allen, 344 U.S. 443 (1953), the Court held that the 1867 Act requires the federal courts to exercise independent judgment on the merits of cognizable claims, notwithstanding prior judgments in state court. Speaking for a majority in Brown, Justice Frankfurter stated explicitly that the federal courts must independently apply relevant legal standards to the facts of particular cases.

In amendments to the habeas corpus statutes in 1966 and 1977, Congress embraced Brown both explicitly and implicitly. Explicitly, Congress codified Brown in a new subsection (a) of 28 U.S.C. §2254, which provides that the federal courts "shall" entertain applications from prisoners who alleged they are in custody in violation of federal law, "pursuant to the judgment of a State court."

Implicitly, Congress codified Brown in two ways. First, in §2254(d), Congress created a presumption in favor of state findings of basic fact, but left the federal courts with authority to make independent determinations on questions of law and "mixed" questions of law and fact, i.e., the application of law to the facts in particular cases. Second, in amendments to 28 U.S.C. §2244, Congress

established a form of preclusion in favor of previous judgments in federal court, but not in favor of prior state court judgments.

Precedents regarding nonfederal and procedural grounds for dismissing habeas petitions do not affect the federal courts' longstanding authority to determine claims independently. Those cases govern the posture in which the federal courts should consider the merits--not the federal courts' authority, in a proper posture, to decide the merits de novo. Thus in Wainright v. Sykes, 433 U.S. 72 (1977), the Court explained that when claims are properly presented for determination on the merits, the federal courts continue to make their own independent judgments as established in Brown.

The decision in Stone v. Powell, 428 U.S. 465 (1976), which largely bars the federal courts from awarding relief on fourth amendment exclusionary rule claims, has no bearing on the question at bar. The Stone decision elaborated the exclusionary rule, not the jurisdiction of the federal courts in habeas corpus. The Court has refused to extend Stone's analysis to other claims--for the very reason that any such extension would violate the jurisdiction established by Congress.

Recent decisions such as Teague v. Lane, 489 U.S. 288 (1989), and Butler v. McKellar, 110 S.Ct. 1212 (1990), are also inapposite. Those decisions largely eliminate from the purview of habeas corpus a category of claims, namely claims that depend on "new rules" established after a prisoner's sentence

became final. They do not affect a federal court's classic obligation to determine the legality of a prisoner's current detention by applying rules that are not "new" and thus remain cognizable in habeas corpus. The federal courts continue to apply the law existing at the time a prisoner was in state court.

While the prisoner in Butler himself claimed that he was seeking only a de novo federal application of a settled rule to a different set of facts, this Court rejected that characterization and held, instead, that the prisoner was seeking the benefits of a "new" rule.

The Court should not reinterpret the habeas corpus statutes while Congress is actively reviewing bills that would reform the habeas jurisdiction. The political process should be allowed to run its course.

There is no emergency to require the Court to act immediately. Problems associated with capital cases are being addressed by the Judicial Conference and Congress. A report compiled by a subcommittee of the Federal Courts Study Committee refutes the charge that habeas corpus must be curbed to stem a flood of petitions in noncapital cases.

ARGUMENT

I. THE FEDERAL HABEAS CORPUS STATUTES REQUIRE THE FEDERAL COURTS INDEPENDENTLY TO APPLY FEDERAL LAW TO THE FACTS OF SPECIFIC CASES.

The Constitution distinguishes the judicial power to exercise jurisdiction in a case or controversy from the legislative power to confer jurisdiction in the first instance. Courts organized pursuant to Article III exercise the federal judicial power. But the "disposal of the judicial power...belongs to Congress." Turner v. Bank of North America, 4 U.S. (4 Dall.) 10 (1799), quoted in Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

The jurisdictional statutes Congress enacts are subject to authoritative construction here.[1] Commonly, the Court

---

[1] The briefs filed by the warden and some amici treat the Court's question as though it were open to resolution without

cooperates with the legislative branch to flesh out the specifics of jurisdictional systems, to ensure that the authority and responsibility Congress wishes the federal courts to have is exercised in an efficient and timely manner. Yet this Court cannot adopt rules that conflict with the policy judgment made by Congress. Habeas corpus for state prisoners fits this description.[2]

---

reference to Congress' primary authority. In this, they fail to appreciate that the issue before the Court is one of statutory construction.

[2] See Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985). Decisions regarding the exhaustion of state remedies, the effect of procedural default in state court, and multiple federal petitions from a single prisoner reflect this Court's efforts to orchestrate the exercise of the jurisdiction conferred by Congress. Recent cases in those fields have drawn criticism in some quarters, but they cannot be said to be in conflict with the basic structure of the jurisdiction Congress has created. They deal solely with the procedural requisites for

A. The 1867 Act

In 1867, Congress extended the federal courts' habeas corpus jurisdiction to cases in which petitioners complain of custody in the hands of state officials. 28 U.S.C. §2241. Historically, the nature of the claims for which the writ provides a remedy may have shifted. Yet there can be no question that with respect to claims that are cognizable, the federal habeas courts are obliged to apply the relevant law de novo.[3] The rule of

---

obtaining federal adjudication of a claim on the merits; they do not limit the authority of the federal courts to determine the merits of claims that are properly presented. See pp. 33-36 infra.

[3] In some cases prior to Brown v. Allen, supra, this Court said that the federal writ was available to raise only "jurisdictional" claims. See pp. 15-16 infra. And under recent decisions, claims depending on "new rules" of law have been eliminated from the scope of habeas corpus in most instances. See pp.

decision must be the habeas court's own judgment regarding applicable law, not a retrospective appraisal of whether the state courts, acted "reasonably" or in "good faith."[4]

37-52 infra. If a prisoner raises a claim that a federal habeas court is not authorized to address, he or she will be denied relief. The reason, however, is not that the federal court has addressed the claim and found it without merit--either independently or out of deference to a previous state judgment. It is that the claim simply is not cognizable in habeas corpus, and the federal court cannot address it at all.

[4] These are the standards offered by the warden and other amici. Brief for the Petitioner at 18; Brief for the United States at 14. They are inconsistent with the very nature of habeas corpus. State judges rendering judgments on federal claims are not like state executive officers, who may assert a "good faith" defense to suits for damages. Cf. Anderson v. Creighton, 483 U.S. 635 (1987). The rationale for that defense is that executive officers might otherwise be deterred from performing their duties by the fear of personal liability. Judges risk no personal exposure when they decide cases. Moreover, Congress has not legislated with respect to official immunity, and

The structure of the habeas statutes makes this plain. The federal courts do not directly reexamine state criminal judgments, but rather entertain independent petitions from state prisoners who challenge the legality of their detention.[5] It is this conceptual feature of the writ that makes habeas corpus "collateral" to any previous criminal proceedings. The federal court's task, then, is not to look back

---

the Court itself may have relative freedom to formulate doctrine in that field. Nor are state courts like federal administrative agencies, which may be entitled to deference in the interpretation of ambiguous statutes if Congress so provides. Chevron U.S.A. v. Nat. Res. Defense Council, 467 U.S. 837 (1984). Congress has not said that "reasonable" state court judgments are generally to be accepted, but, instead, has assigned to the federal courts a jurisdiction in habeas corpus independently to apply the law to the facts of specific cases.

[5] 28 U.S.C. §§2241, 2242.

at actions taken in state court under a standard of review. It is rather to address the claim a petitioner actually raises, indeed, the only claim a petitioner can raise in habeas corpus: a federal claim against the legality of his or her current custody.

B. The 1948 Act

Respected opinion is divided over the speed by which this Court decided that the 1867 Act directs the federal courts to exercise independent judgment on the merits, whether or not the state courts committed "jurisdictional" error or gave prisoners an opportunity to press federal claims. The exchange between Justices Brennan and Harlan in Fay v.

Noia, 372 U.S. 391 (1963), is the classic illustration.[6]

In the 1940s, there were proposals to amend the 1867 Act to require the federal courts to defer to state judgments.[7] Congress actually enacted

---

[6] Professor Bator contended that the principle of independent federal adjudication was not clearly established until 1953. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963). Others disagree. E.g., Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.--C.L. L. Rev. 579 (1982); Saltzburg, Habeas Corpus: The Supreme Court and the Congress, 44 Ohio St. L.J. 367, 381-82 (1983), citing, e.g., House v. Mayo, 324 U.S. 42 (1945); Mooney v. Holohan, 294 U.S. 103 (1935). Professor Wechsler reads Moore v. Dempsey, 237 U.S. 309 (1923), to have held that "the habeas court had a duty to adjudicate the merits" of a "mob domination" claim. Wechsler, Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ, 59 U. Colo. L. Rev. 167, 173 (1988).

[7] See Winkle, Judges as Lobbyists: Habeas Corpus Reform in the 1940's, 68 Judicature 263 (1985).

few innovations touching habeas in the 1948 revision of the Judicial Code.[8] Then this Court took up the consolidated cases in Brown v. Allen, supra, in which Justice Reed's majority opinion addressed and decided the very question on which this Court has invited briefs: what effect should a federal court give to a prior state court decision rejecting a prisoner's federal claim on the merits? The Court said:

> [T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort in another jurisdiction... It is not res judicata. Id. at 458.[9]

---

[8] The most important was the codification of the exhaustion doctrine previously established in Ex parte Royall, 117 U.S. 241 (1886). 28 U.S.C. §2254. See H. Rep. No. 308, 80th Cong., 1st Sess. (1947).

[9] Another amicus contends that this reference to res judicata suggests that the Court in Brown equated the effect of a prior state judgment with the effect of

Next, the Court turned to the cases at hand and independently applied federal legal standards to the facts in each instance. Individual justices divided over the proper disposition of the consolidated cases in Brown, but only Justice Jackson disagreed with the Court's interpretation of the 1867 Act to call for de novo federal adjudication. A majority not only joined Justice Reed's statement regarding the effect of prior state judgments, but also endorsed the

---

a previous federal judgment as outlined in Salinger v. Loisel, 265 U.S. 224 (1924). Brief for the Criminal Justice Legal Foundation at 15. That argument is quite wrong. The Court in Brown recognized that neither a prior federal nor a prior state judgment was preclusive in the rigid sense of ordinary res judicata rules, but that a previous federal judgment would typically cut off a later petition while a previous state judgment would not. Initial federal petitions (albeit filed after judgment in state court) have always been handled on a separate track from second or successive federal petitions.

elaboration of that interpretation in a separate opinion by Justice Frankfurter.[10]

---

[10] The warden and an amicus contend that Justice Frankfurter's opinion was "at odds" with that of Justice Reed. Brief for the Petitioner at 11 n.5; Brief for the Criminal Justice Legal Foundation at 14-16. Justice Reed did refer to the federal courts' "discretion" to entertain petitions from state prisoners, but it is a distortion to suggest that he meant that when the district courts below had treated prisoners' claims de novo, and when the Court itself did the same, it was because the confession and race discrimination claims presented in Brown were so compelling or systemically important as to warrant a special, discretionary departure from a general rule of deference to state judgments. The majority opinion in Brown clearly contemplated that the federal courts had power to address claims on the merits--and were expected to use it.

The allocation of business among the opinions in Brown was a function of a different internal debate over whether this Court's previous denial of certiorari on direct review should bar consideration of the merits in the district courts. Justice Reed took the minority position on that question. Justice Frankfurter then elaborated on "the bearing of the proceedings in the State courts upon the disposition of the

Ever sensitive to state interests, Justice Frankfurter nonetheless recognized the separation-of-powers principle at stake:

> It is not for us to determine whether this power should have been vested in the federal courts....[T]he wisdom of...a modification in the law is for Congress to consider....Id. at 499-500.

In these explicit terms, Justice Frankfurter grounded the decision in Brown firmly on an interpretation of statute and recognized that judge-

---

application for a writ of habeas corpus in the Federal District Courts"--a matter on which a majority was agreed. Id. at 497 (opinion of Frankfurter, J.) (explaining that the "views of the Court" could be "drawn from the two opinions jointly"). Notwithstanding the doubts the warden hopes to create regarding Justice Frankfurter's opinion, the fact remains that both this Court and Congress have accepted it as authoritative. See pp. 22-27 infra. The warden cannot prevail on the question before the Court today by simply ignoring what Brown has always been understood to mean.

fashioned rules to govern the process by which the federal courts exercise their statutory jurisdiction cannot legitimately undercut the substance of the authority that Congress has concluded should be theirs:

> All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim...cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have....Id. at 500 (emphasis supplied).

The independent judgment the federal courts are to exercise clearly extends to the application of legal principles to the facts of a particular case. The federal courts may be guided by the state record, and in many cases a prisoner's legal claim may turn on "basic facts...(in the sense of a recital of external events and the credibility of

their narrators)...,[which may] have [been] tried and adjudicated against the applicant [in state court]." But:

> Where the ascertainment of the... facts does not dispose of the claim but calls for interpretation of the legal significance of such facts,...the District Judge must exercise his own judgment on this blend of facts and their legal duties. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge...." Id. at 507-08 (emphasis supplied).

The construction the Court placed on the 1867 Act in Brown has been questioned.[11] Yet whether or not one

---

[11] Judge Parker had argued that the exhaustion doctrine should not merely postpone federal adjudication of the merits, but should foreclose federal habeas corpus at any time. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 176 (1948). This Court rejected that view in Brown. A rule of timing that requires prisoners to pursue state relief before filing a federal petition presupposes that when state remedies have been exhausted, federal adjudication will be available. The

agrees with the Court's work in 1953, the critical point now is that Brown did place an authoritative interpretation on the Act--an interpretation that has stood for decades. The question on which this Court has now sought advice invites a frontal assault on Brown and all the developments in the law of habeas corpus since Brown. For both the legislation Congress has enacted over the last forty years and the decisions this Court has rendered are intelligible only against the baseline established by Brown.

After Brown, Congress rejected several plans that would have had the federal courts defer to state decisions on federal claims if prisoners received a

---

state courts may be the first courts to address a federal question, but their judgments cannot be given deference without a fundamental distortion of the exhaustion requirement.

"fair and adequate" opportunity to litigate in state court.[12] Then, in Fay v. Noia, supra, and other decisions in 1963, the Court confirmed that the federal courts are not to defer to previous state court applications of law to particular fact patterns.[13]

---

[12] E.g., H.R. 5649, 84th Cong., 1st Sess. (1955), discussed in Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956). See also Report of the Committee on Habeas Corpus, 33 F.R.D. 367 (1964).

[13] Fay v. Noia, supra; Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963). While Justice Harlan dissented from the majority's treatment of state judgments resting on nonfederal grounds, he recognized that Brown had decided that when the merits were not procedurally foreclosed, a federal habeas court "had the right and duty to satisfy itself of the correctness of the state decision." Noia, supra at 461 (emphasis supplied). In a separate dissent, Justice Clark accepted Brown's reading of the habeas statutes and recognized that if the law was to be changed, Congress would have to do it. Id. at 447-48.

C. The 1966 Act

When Congress did enact new habeas legislation in 1966, it did not curtail the federal courts' authority to make independent judgments on federal claims. Instead, Congress amended the 1867 Act in a way that can only be understood to track this Court's 1963 decisions with respect to the substantive scope of the federal courts' authority.[14] Cf. Stone v. Powell, supra at 536-37 (1976) (White, J., dissenting).

First, the 1966 Act amended §2254 by moving the existing paragraphs (on the exhaustion doctrine) into subsections, (b) and (c), and by adopting an explicit articulation of the federal courts' authority to entertain petitions from state prisoners in a new subsection (a):

---

[14] Pub. L. 89-711, 80 Stat. 1104-05 (1966).

> (a)The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This language, enacted only three years after Noia, Townsend, and Sanders, and amid calls for the repudiation of Brown, cannot fairly be read to contemplate that the federal courts will defer to prior state judgments. On its face, the new statute explicitly confirms the federal courts' obligation to receive properly presented petitions from state prisoners, to test the basis of petitioners' custody for federal error, and to cure any error they find. To read this language to contemplate deference to the state courts would be to thwart the clear congressional policy it represents.

We read §2254(a) to codify Brown, and, indeed, we think that is the way this Court has always read it.[15]

Any doubts about this conventional interpretation of subsection (a) are resolved by the other innovations in the 1966 Act, which implicitly take Brown as a benchmark. A new subsection (d), added to §2254, isolates state determinations of "factual" issues and instructs the federal courts to presume such judgments to be correct, if reached in a procedurally acceptable manner. If it had been intended that the federal courts would defer not only to the state courts' factual findings, but to their legal

---

[15] In light of the 1966 Act, it is incorrect to contend that the federal courts' authority to apply the law to facts rests on an inference from congressional "silence" since Brown. E.g., Brief for the Criminal Justice Legal Foundation at 18.

conclusions as well, subsection (d) would scarcely have been limited explicitly to factual issues. The clear implication is that state decisions on the merits of prisoners' legal claims would not be entitled to deference.

Both the Judicial Conference committee that suggested subsection (d) and the congressional committees that reported it to the floor distinguished between state factual findings, to which the new law would apply, and state declarations of legal principles and the application of law to facts--to which subsection (d) would not apply.[16]

---

[16] H. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966). A plan that would have given state factual findings preclusive effect was rejected on the ground that it would have been "wholly incompatible with the duty of the Federal courts to determine Federal constitutional questions." Report of the Committee on Habeas Corpus, 33 F.R.D. 367, 379-80 (1964).

This Court has held that the "ultimate question" of the merits of a claim is open to independent judgment by the federal courts. Legal questions, or "mixed" questions of law and fact, are "not governed" by subsection (d). Sumner v. Mata, 455 U.S. 591, 597 (1982); accord Miller v. Fenton, 474 U.S. 104 (1985).[17] A decision to instruct the

---

[17] In some instances, the Court has divided over whether to characterize issues as factual (and thus subject to the statutory presumption) or legal or "mixed" (and thus open for independent federal consideration). It is one thing, in a close case, to put an issue in the category of "fact" when others would have placed it on the other side of the fact/law line. It would be quite another thing to ignore the fact/law line altogether, when Congress has employed that line to make allocations of authority between the state and federal courts.

The United States suggests that the Court itself should jettison the fact/law distinction employed by §2254(d) in order to prevent unscrupulous prisoners from

federal habeas courts to defer to state court applications of law to facts could be rendered only in the teeth of the language in subsection (d), the legislative history behind it, and this Court's interpretations of it.[18]

---

obtaining a federal forum to which they are not entitled simply by recasting their claims to depend on "mixed" issues. Brief for the United States at 17-18. It is not for a litigant to control a federal court's handling of a case under the §2254(d), but for the court itself to characterize a claim for purposes of the statute.

[18] An amicus suggests that once it is recognized that the fact/law distinction is used in §2254(d) to allocate judicial authority, it follows that the Court should begin by deciding which court, state or federal, it thinks should determine a question and then characterize the question as factual or legal accordingly. Brief of the Criminal Justice Legal Foundation at 27. There is language in Miller v. Fenton, supra, acknowledging that forum-allocation concerns inform the Court's decisions under §2254(d). But nothing in that case suggests that the Court does or can simply substitute its own forum-allocation choices for determinations of whether questions are factual, legal, or

The last innovation in the 1966 Act also implicitly recognizes Brown as its premise. In amending §2244, dealing with successive federal petitions, the 1966 Act did introduce into habeas corpus a "qualified" form of res judicata. S. Rep. No. 1797, supra at 4. If Congress had meant to establish any such rule of deference in favor of prior state judgments, the 1966 Act would scarcely

---

"mixed." The holding in Miller that the voluntariness of a confession is a "mixed" issue for independent federal consideration makes clear that the fact/law distinction, difficult as it may be to draw in some cases, has its own substantive content. Since Congress has decided that the fact/law distinction should govern the allocation of authority between the state and federal courts, the federal courts must draw that distinction fairly and thus give effect to congressional judgment. To argue otherwise is to argue that the square holding in Miller must be overruled--which is precisely what the warden and the United States propose. Brief for the Petitioner at 18-19 n.10; Brief for the United States at 17 n.6.

have, simultaneously, added subsection (a) to §2254 (and thus underscored the availability of habeas corpus after a judgment in state court), and established a form of preclusion for multiple federal petitions in §2244.[19]

D. The 1977 Rules

The only relevant legislative action regarding habeas corpus since 1966 has been the adoption of the Habeas Corpus Rules in 1977. If it had been imagined that state judgments would be entitled to deference (beyond the respect recognized in Brown), it would hardly have made sense to establish an elaborate set of procedural rules to streamline the

---

[19] In this way, too, Congress has recognized since Brown that previous state judgments are not to be treated in the manner of previous federal judgments. See note 9 supra. Cf. 28 U.S.C. §2244(c), also added in 1966 to give preclusive effect to previous judgments by this Court.

processing of federal habeas cases.[20] The central purpose of the rules was to eliminate procedural barriers to efficient federal determinations of the merits of claims.

This Court's longstanding interpretation of the habeas statutes to require independent federal adjudication of federal claims has been confirmed by interim legislation and should not now be abandoned without further congressional action.

E. Claims Barred on Procedural Grounds

The Court has recently tightened the procedural requirements prisoners must meet in order to place claims before the district courts. E.g., Coleman v.

---

[20] See Hearings on H.R. 15319 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 2d Sess. 104 (1976); H. Rep. No. 1471, 94th Cong., 2d Sess. (1976).

Thompson, 111 S.Ct. 2546 (1991) (reinforcing the rules restricting prisoners' ability to seek federal relief on claims that were not raised properly in state court); McCleskey v. Zant, 111 S.Ct. 1445 (1991)(placing similar limits on successive federal petitions from a single petitioner). Nothing in those cases departs from the understanding that the federal courts exercise de novo judgment regarding the application of law to facts.

Cases like Coleman, supra (dealing with procedural default in state court) govern the posture in which a federal court may treat the merits of a claim rather than the court's obligation, in a proper posture, to exercise independent judgment on the merits. Thus in Wainwright v. Sykes, supra, the Court explained that it "in no way changed" the

substantive scope of the federal courts' responsibility:

> [T]he...petitioner...is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in state proceedings. Id. at 87 (emphasis supplied).[21]

The cases on the "abuse of the writ" doctrine regarding successive federal petitions are similar. The Court explained in McCleskey, supra at 1462, that the federal courts consider the merits of claims "presented in a proper procedural manner." Here, too, this Court's decisions on the procedural posture in which claims must be presented

---

[21] If federal consideration of the merits of the claim in Sykes had not been barred, that claim under Miranda v. Arizona, 384 U.S. 436 (1966), would have been open for de novo review--which, of course, would have meant applying the Miranda rules to the facts of the case. See, e.g., Duckworth v. Eagan, 492 U.S. 195 (1989).

presuppose that, when claims are properly presented, the federal courts will determine the merits independently.

F. Claims Based on the Fourth Amendment Exclusionary Rule

Nor does Stone v. Powell, supra, undermine the district courts' authority to adjudicate federal claims afresh. Stone bars federal relief on a fourth amendment exclusionary rule claim, unless the prisoner was denied an opportunity for "full and fair" litigation in state court. Yet in Stone this Court explicitly disclaimed any purpose to change the federal courts' jurisdiction in habeas corpus. 428 U.S. at 494-95 n.37.[22] Despite arguments that a

[22] The decision in Stone was not an interpretation of the habeas statutes at all. It was an elaboration of the exclusionary rule. Id; Allen v. McCurry, 449 U.S. 90, 98 (1980). See Wechsler, supra at 176; Wright, Habeas Corpus: Its History and Its Future, 81 Mich. L. Rev.

similar analysis should be applied to other claims, the Court has held Stone to its exclusionary rule moorings--because an extension would conflict with the habeas statutes enacted by Congress. E.g., Rose v. Mitchell, 443 U.S. 545 (1979).[23]

G. Claims Based on New Rules

The warden and some amici contend that the Court's decisions on the "retroactive" effect of "new rules" of law establish a rule of deference to the

802, 807 (1983).

[23] After all, the "full and fair adjudication" standard invoked with respect to exclusionary rule claims in Stone is the standard conventionally associated with preclusion under the full faith and credit statute. 28 U.S.C. §1738. See Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982). Habeas corpus is an express statutory exception to §1738. Id. at 485 n.27; Allen v. McCurry, supra at 98 n.12.

state courts.[24] Those decisions are inapposite. They eliminate from the purview of habeas corpus a category of claims, namely claims that depend on genuine changes in the substantive content of legal rules after a prisoner's sentence became final on direct review. They do not affect a federal court's classic function in habeas corpus to inquire into the legality of a prisoner's current detention by applying settled rules to the facts.

To be sure, some descriptions of "new rules" in recent decisions are quite broad. For example, in explaining why the rule in Butler, supra, was "new" for habeas purposes, the Chief Justice said that, at the time the petitioner's case

---

[24] Teague v. Lane, supra; Butler v. McKellar, supra; Saffle v. Parks, 110 S.Ct. 1257 (1990); Sawyer v. Smith, 110 S.Ct. 2822 (1990).

was in state court, the rule he advanced had been "susceptible to debate among reasonable minds." Butler, 110 S.Ct. at 1217.[25]

It is quite wrong, however, to take this language out of the context in which it was used and to understand Butler to address not a change in the content of a rule, but a disagreement over the application of an unchanged rule. The principle underlying the Teague line of cases is that the federal habeas courts sit to ensure that the state courts respect and apply federal law as it is when cases come before them--not as it may be in the future. Thus federal habeas corpus is not available to address

---

[25] Cf. Sawyer, 110 S.Ct. at 2827 (referring to "gradual developments in the law"). But see Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (referring to a "clear break" from precedent).

claims that require the announcement or application of a change in the law since the prisoner's convictions became final.

The Butler decision only implements the analysis in Teague. In Edwards v. Arizona, 451 U.S. 477 (1981), the Court excluded a confession obtained after a suspect had refused to answer questions without a lawyer present. The prisoner in Butler contended that his statement, too, was excludable, even though, in his case, the interrogation had continued with respect to a different offense. The petitioner in Butler described his argument as a request that the rule announced in Edwards be applied to a "different set of facts." Butler, 110 S.Ct. at 1217. Yet that characterization was plainly rejected. No matter how the prisoner himself couched his argument, it was for the district court in the first

instance, and this Court on appeal, to determine the true character of the claim. In fact, the Court held that the prisoner was not seeking the application of a settled rule to an analogous fact pattern, but rather was seeking the benefits of a "new rule."[26]

---

[26] E.g., Arizona v. Roberson, 486 U.S. 675 (1988)(finding such a claim meritorious--but only after the Butler petitioner's conviction had become final). The proper characterization of the rule on which a petitioner relies can present a close issue. The Court's decision in Butler has been criticized. E.g., Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733, 1747-48 (1991). And the warden in the instant case complains that the Fourth Circuit should have decided that Mr. West actually seeks to establish a "new" rule against inferring theft from possession--instead of an application of the settled rule in Jackson v. Virginia. Yet the possibility that decisions may be questioned hardly suggests that the courts that render them are not doing what they purport to be doing. See note 17 supra.

The warden ascribes to Butler a purpose never mentioned in the Court's opinion, namely an extension of the analysis initiated in Teague "beyond an ordinary concept of non-retroactivity." Brief for the Petitioner at 18. It would be dangerous business to ascribe any such hidden agenda to Butler.

If the warden is correct, this Court has already reinterpreted the habeas statutes to preclude federal treatment of the merits, provided the state courts act "reasonably." Brief for the Petitioner at 16. If this is true--if the Court has already grappled with the terms of the 1867 Act, longstanding interpretations of that Act, and the effects of the 1966 amendments--the Court has done all this sub silentio. While many recent decisions refer to the statutory scheme that controls habeas corpus, none states

that the habeas statutes now mean that the federal courts must defer to "reasonable" state court applications of federal law.

If the warden is right, the definition of a "new rule" no longer serves the function it was assigned in Teague. In Teague, that definition identified what law a federal court could employ in order to adjudicate a claim. Now, according to the warden, the "new rule" definition no longer specifies the content of the legal standards that can be enforced in federal habeas corpus, but, instead, prescribes a standard of review by which the federal courts are to examine a previous state judgment.

This moves too far, too fast, on too little. Teague and Butler do not revolutionize the very nature of habeas corpus under the 1867 Act. They carve a

category of claims out of the purview of habeas (claims resting on changes in the law) and leave intact the federal courts' longstanding authority to adjudicate the claims that remain (claims resting on settled law).

If the warden is right, it would seem to follow that nearly every rule is "new" for purposes of habeas corpus--either because the state courts might reasonably have employed a different rule, or because a settled rule applied to the facts of a particular case makes "new" law for that case. Here again, the warden has reached an implausible conclusion by piecing together statements taken out of context. The very point of identifying some rules as "new" must be to distinguish them from other, settled rules. In context, the quotations the warden takes from Teague, Butler, and

Parks, supra, presuppose that some rules are not "new" at all.[27] Accordingly, they continue to be applied by the federal courts in the de novo manner prescribed by statute.[28]

If the "every-rule-is-a-new-rule" theme is pressed, as it is by the warden and other amici, it leads to the untenable conclusion that the federal courts make "new" law every time they

---

[27] E.g., Teague, supra at 309 (referring to "constitutional rules [that were] not in existence at the time a conviction became final")(emphasis supplied); Sawyer, supra at 2827 (distinguishing rules "in existence at the time the conviction became final" from "later emerging legal doctrine").

[28] E.g., Penry v. Lynaugh, 492 U.S. 302 (1989). See Teague, supra at 306, quoting Justice Harlan in Mackey v. United States, 401 U.S. 667, 679 (1971) (stating that the federal courts should "apply the law prevailing at the time a conviction became final").

decide a case.[29] That conclusion, in turn, confuses what are conventionally thought to be "pure" legal questions with "mixed" questions of law and fact. Since Brown v. Allen, both this Court and Congress have recognized that the boundary between purely legal and "mixed" issues can be difficult to police. That is why both kinds of questions are open

---

[29] This Court's precedents reflect no such radical understanding of law and legal method. Certainly, Justice Harlan thought that the decision on the novelty of a rule would often be close. In his view, the "content" of constitutional principles rarely changed "dramatically from year to year." Moreover, what might appear on first glance to be the announcement of a "new rule" might, instead, be "simply" the application of a "well-established constitutional principle" to a "closely analogous" case. Desist v. United States, 394 U.S. 244, 263 (1969) (dissenting opinion). See Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 60 (1965)(stating that "courts...handle the vast bulk of cases by application of preexisting law").

for de novo federal adjudication under the habeas statutes.

The warden and the United States, by contrast, now contend that since "all" purely legal issues are foreclosed in habeas corpus by Teague and Butler, and since the line between those questions and "mixed" issues is often unclear, the Court should channel both "pure" and "mixed" questions to the state courts in the manner that §2254(d) funnels questions of fact in that direction. Brief for the Petitioner at 22; Brief for the United States at 13.

This is untenable. Again, under the Teague line of cases on "retroactivity" the federal courts continue to apply settled law, but do not entertain claims depending on changes in the law. It defies the premise of the Teague decisions to take the Court's words out

of the "retroactivity" context and to read them to undercut the very habeas corpus jurisdiction Teague presupposes.

The warden and the United States openly invite the Court to cease distinguishing among legal, factual, and "mixed" questions. Yet the statute now on the books does not treat legal and "mixed" issues in the way it treats questions of fact. Instead, §2254(d) draws common distinctions among those kinds of questions and relies on those distinctions to allocate authority between the federal and state courts.

Nor can the Court simply ignore conventional distinctions among legal, factual, and "mixed" questions in the habeas context without regard for repercussions in other fields in which these distinctions have always made a difference. A lot of things may have to

be done to decide whether there was enough evidence to convict Frank West of larceny in Westmoreland County, Virginia. A fundamental reworking of legal categories in which American lawyers and judges have expressed their thinking time out of mind is not one of them.[30]

Finally, if Butler has already terminated the federal courts' authority to decide "mixed" questions, numerous recent precedents must be taken to have been overruled--again sub silentio. Not

---

[30] To the extent this Court decides in close cases that prisoners actually are attempting to establish or rely on "new" rules, and to the extent the Court concludes that issues are factual rather than "mixed," the state courts' authority to decide issues will be enhanced. Yet there is a critical, constitutionally grounded, difference between implementing a set of legislatively prescribed distinctions in a way that may be controversial in individual instances, and failing to accept those distinctions at all. That difference is at the root of the issue the Court asked the parties to brief.

only has the holding in Miller v. Fenton, supra, been discarded, but the analysis the Court has always used in §2254(d) cases has equally been jettisoned. E.g., Cuyler v. Sullivan, 446 U.S. 335 (1980) (holding that the effectiveness of counsel is a "mixed" question for de novo federal determination). Indeed, since all the Court's important decisions regarding §2254(d) were handed down prior to Teague and Butler, none of them is apparently any longer to be relied upon. If the warden is right, the Court overruled all those cases by defining a "new rule" for "retroactivity"

purposes.[31] This proves entirely too much. It cannot be sustained.

Moreover, if the warden is right, the Court has acted in an extraordinary way of late--by continuing itself to apply the law to the facts in specific habeas cases, notwithstanding Butler. See, e.g., Estelle v. McGuire, 112 S.Ct. 475 (1991)(independently determining whether the facts in a particular case made out a due process violation); Lewis v. Jeffers, 110 S.Ct. 3092 (1990) (applying settled precedents regarding the eighth amendment to the facts of a

---

[31] If the Court's supposed pattern of sub silentio overruling stretches back to Teague, the internal division in Duckworth v. Eagan, supra, is unintelligible. For if law-application claims were already banished, there should have been no further need to debate whether the analysis of fourth amendment claims in Stone v. Powell, supra, should be extended to Miranda claims. Yet there plainly was reason to debate that question.

particular habeas case); Penry v. Lynaugh, supra (same).

In fact, nothing has changed regarding the federal courts' authority to entertain cognizable claims and, in so doing, to apply relevant legal standards to the facts of particular cases. The interpretation of the habeas corpus statutes in Brown v. Allen remains the law. If the scope of the federal courts' jurisdiction is to be changed, that change must come from Congress.[32]

---

[32] Several recent bills introduced in Congress would narrow the definition of "new rules" for purposes of the Teague line of cases. The pending crime bill, H.R. 3371, would define a "new rule" as a "clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in state court." See also H.R. 4737, 101st Cong., 2d Sess. (1990); H.R. 5269, 101st Cong., 2d Sess. (1990). Relevant committee reports explain that the bills are meant to avoid the definition suggested by Butler, supra. H. Rep. 102-242, 102d Cong., 1st

II. THE COURT SHOULD NOT REINTERPRET THE HABEAS STATUTES WHILE CONGRESS IS DEBATING PROPOSALS FOR REFORM.

Even if existing statutes were not so clear as they are, this would not be the season for this Court to reinterpret those statutes. Bills bearing on the issue on which this Court has invited briefs are under active review in Congress. Moreover, perhaps because of the procedural decisions the Court has rendered in recent years, the rate of habeas petitions from state prisoners is now on the decline.

Ordinarily, the pendency of related bills should not prevent this Court from

---

Sess. 130-31 (1991); H. Rep. 101-681, 101st Cong., 2d Sess. 125 (1990). The definition in H.R. 3371 was included in the House bill this year. It has been adopted by the conference committee appointed to reconcile the Senate and House bills, 137 Cong. Rec. H11691, approved again in the House, id. at H11756, and now awaits Senate action.

construing existing statutes as needed in cases accepted for review. In this instance, however, Congress is debating bills going to the jurisdiction of the federal courts, a matter peculiarly within the legislative competence and sounding in the separation of powers. The parties have not raised the question of the effect the federal courts should assign to state applications of law. Nor is it essential to engage that question to decide the issue on which this case turns, namely whether there was sufficient evidence to convict Mr. West.

We submit, therefore, that the Court should avoid the appearance of reaching out to do by judicial decision what the President and allied members of Congress

have been unable to do by legislation.[33]

---

[33] An amicus contends that the state courts are now better than they used to be and that it would be "fitting" for "this Court" to hold that federal adjudication is "inappropriate" in most instances. Brief for the Attorney General of Florida at 2, 8. If it is true that the circumstances that caused Congress to confer jurisdiction on the federal courts no longer obtain, it is for Congress to amend the controlling statutes. State attorneys general are entitled to address their arguments to Congress and, in fact, have done so. E.g. Hearings on S. 635 Before the Senate Judiciary Committee, 102d Cong., 1st Sess. 9 (1991)(typewritten statement of Daniel E. Lungren of California) (stating that habeas corpus was "created by Congress and expanded through judicial construction" and that "only the Congress can repair the problems...we are now experiencing"). Cf. Hearings on H.R. 1400 Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 102d Cong., 1st Sess. 7 (1991) (typewritten statement of Andrew G. McBride, Assoc. Deputy Attorney General of U.S.) (stating that "Congress should adopt a...rule of deference to state court determinations of law and the application of law to facts").

A. Current Debates in Congress

Most bills debated recently seek primarily to resolve the vexing problems generated by capital litigation. Every bill that has advanced to the floor of either chamber has included, in whole or in part, the recommendations of a committee of the Judicial Conference, chaired by Justice Powell.[34] The Powell Committee plan would leave the present scope of the federal courts' substantive judgment unchanged, but would

---

[34] Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (1989). See S. 1757, 135 Cong. Rec. S13474; Hearings on S. 1757 Before the Senate Committee on the Judiciary, 101st Cong., 1st Sess. 119 (1989). Elements of the Powell Committee's plan were incorporated in an omnibus crime bill in the 101st Congress. S. 1970, 136 Cong. Rec. S6882. The House rejected several reform measures in favor of a substitute, which contained the Powell Committee report verbatim. 136 Cong. Rec. H8881.

make procedural adjustments to streamline the processing of capital cases.[35]

Some bills contain provisions such as the President's proposal to bar the federal courts from awarding relief on a claim that was "fully and fairly adjudicated" in state court.[36] A change of that kind would take square aim at Brown v. Allen, supra.[37]

---

[35] The Judicial Conference has embraced some of the Powell Committee's proposals and amended the committee report in other respects. Administrative Office of U.S. Courts, News Release, March 14, 1990; see Hearings on H.R. 4737 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, 101st Cong., 2d Sess. 137 (1990)(statement of Judge Donald P. Lay).

[36] S. 635, 102d Cong., 1st Sess. (1990), 137 Cong. Rec. S3192; H.R. 1400, 102d Cong., 1st Sess. (1990), 137 Cong. Rec. H1669.

[37] A Justice Department commentary on the President's program specifically states that the purpose is to amend the habeas corpus statutes in order to

Some proponents of the President's plan contend that adjudication would not be "full and fair" in the "intended sense" if the decision reached in state court fails to "reflect a reasonable disposition in light of the facts found and the rule of law applied." S. Rep. No. 98-226, 98th Cong., 1st Sess. 25 (1983). So understood, the plan would implicate the question now before the Court. The idea appears to be that a federal court should not grant relief to a prisoner even if the court concludes that the state courts were wrong, but only if they were unreasonably wrong.

In the first session of this Congress, the Senate adopted the full-

---

displace this Court's interpretation in Brown and substitute "a more limited standard of review." United States Department of Justice, The Comprehensive Violent Crime Control Act of 1991: A Summary 25 (1991).

and-fair-adjudication formula as part of an omnibus anti-crime bill. It was not included in the House crime bill, however, and an amendment containing it was defeated on the floor. The conference committee also rejected the full-and-fair-adjudication program and embraced, instead, the habeas reform plan in the House-passed bill. The House has adopted the conference bill, but the Senate has not yet acted on it.[38]

If this Court is "to stay, and to appear to stay, above the hue and cry" of politics, the legislative process in Congress must run its course. Monaghan, The Burger Court and "Our Federalism," 43 Law & Contemp. Probs. 39, 49-50 (1980).

---

[38] See note 32 supra.

B. The Declining Rate of Habeas Petitions from State Prisoners

There is no compelling reason for the Court to press ahead of Congress. The serious problems with the current system occur only with respect to capital litigation, and Congress shows every intention of enacting legislation to reduce the stress in those cases.

Noncapital cases, like this case from Virginia, present no urgency. A subcommittee of the Federal Courts Study Committee recently concluded that the data "do not support" the charge that the federal courts are "staggered by an ever-increasing flood" of petitions.[39] While the absolute numbers of petitions have risen slightly in recent years, the

---

[39] Report of the Subcommittee on the Federal Courts and Their Relation to the States, I Federal Courts Study Committee, Working Papers and Subcommittee Reports 468 (1990).

prison population has increased "dramatically"--by 469% between 1944 and 1987. Report, supra at 469. Thus "habeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970, and have declined steadily ever since." Id. at 470-71 (emphasis supplied).[40] This downward trend in the rate of habeas filings, "whatever its cause,...refutes

---

[40] The number of petitions per hundred prisoners has followed this pattern: 1945--0.47; 1961--0.52; 1970--5.05; 1988--1.85. Meanwhile, the number of federal judges has increased. Report, supra at 10 (counting 321 Article III judges in 1955 and 699 in 1988, an increase of more than 100%). Writing before the decisions in Coleman v. Thompson, supra, and McCleskey v. Zant, supra, the subcommittee ascribed the drop in the rate of petitions to this Court's procedural decisions "making habeas corpus more difficult to obtain." Report, supra at 471. If that judgment is accurate, the actions the Court has already taken have had a significant impact on the size of the federal habeas caseload.

the claim that reform is necessary to stem the flood of petitions...." Id. at 472. The Court can and should await the results of the political process--to which the prescription of federal court jurisdiction is constitutionally assigned.

CONCLUSION

For the reasons stated above, we respectfully urge the Court to confirm that a federal court considering a habeas corpus petition from a state prisoner should not give deference to a previous state court application of law to the specific facts of the case.

Respectfully submitted,

Larry W. Yackle

Counsel for Amicus Curiae